SUPREME COURT, U. S.

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IN THE

Supreme Court of the United States

October Term, 1967
No. 207

OWEN E. JACKSON, GEORGE DITSON JONES, GEORGE H. HOWELL, JR., WINONA L. JACKSON and TRANSCONTINENTAL OIL CO., INC. of NEVADA, now known as TRANSCONTINENTAL POWER COMPANY, a corporation,

Petitioners and Defendants,

vs.

WESTERN GEOTHERMAL, INC., a corporation,

Respondent and Intervenor,

WILLIAM FREE,

Respondent and Plaintiff,

and

HARRY C. LEVY, as Receiver of Transcontinental Power Company, SALTON SEA POWER COMPANY, and HARRY LEVY, as Receiver of Salton Sea Power Company,

Respondents.

On Petition for Writ of Certiorari to the Supreme Court of the State of Nevada.

PETITION FOR REHEARING.

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On Petition for Writ of Certiorari to the Supreme Court of the State of Nevada.

PETITION FOR REHEARING.

Petitioners Owen E. Jackson, George Ditson Jones, George H. Howell, Jr., Winona L. Jackson and Transcontinental Oil Co., Inc. of Nevada, now named Transcontinental Power Company, a corporation, often referred to as Transcon, pray for rehearing of denial of Writ and pray that a Writ of Certiorari issue to review judgments of the Supreme Court of Nevada in the matter before it entitled Jones vs. Free, its No. 5107 and the district court orders affirmed thereby.

Opinions Below.

The opinion of the Supreme Court of Nevada is reported at 422 P. 2d 551, 83 Nev. ..... and is Appendix E to the Petition for Writ herein.

A prior opinion affirming the appointment of the receiver is reported in 291 P. 2d 317, 80 Nev. 207.

Jurisdiction.

Jurisdiction is invoked under 28 U.S.C. §1257(3). The judgment herein would be reviewable also on an appeal under §1257(2). The timely petition was denied on October 9, 1967 and rehearing is sought pursuant to Rule 58.

Questions Presented.

The substantial grounds of hearing available to petitioners although not previously presented include:

(a) Is the Nevada Statute constitutional?

(b) Is it constitutional for a court appointed temporary receiver from the State of Nevada to commit acts which are proscribed as felonies and commit other violations of California law in his dealings respecting California real property and securities?

Petitioners also contend that because of the intervening circumstances of substantial or controlling effect and the essence of time, this court should grant a hearing as to the conduct and jurisdiction of a receiver to do the things complained of in the Petition for Writ of Certiorari independently of the constitutionality of the statute.

Constitutional Provisions and Statutes Involved.

This case involves §1 of Amendment XIV to the United States Constitution:

> ". . . nor shall any state deprive any person of life, liberty or property without due process of law;"

It involves the following statutes, copies of which are appended hereto: California Code of Civil Procedure:

> §568.5 and paragraph 3 of §692: notice of time and place of receivers sales of real property to be posted on the real property and published in a newspaper.

California Corporations Code:

> §25008: A certificate of interest in mining title and an interest in title or profits are securities; §25100; exempt securities; §25500 and §26100: sales thereof without a permit are void; and §26104: it is a felony to issue a security without a permit or to sell one previously so issued.

Vol. 1 Nevada Revised Statutes:

> §§78.630 and 78.650: empowering the court to appoint a receiver in a summary way on affidavits on application of a 10% shareholder; §78.635 giving the receiver power to settle with any debtor or creditor; and §78.640; giving him title to out of state real estate.

Argument for Granting of Petition for Rehearing and for Allowance of Writ of Certiorari.

As said in *Flynn v. United States of America*, 348 U.S. 909 of rehearings:

> "The right to such a consideration is not to be deemed an empty formality as though such petitions will as a matter of course be denied".

The Nevada statute under which the Nevada receiver acted is unconstitutional and its unconstitutionality is a substantial ground not previously presented. We previously confined our grounds to the unconstitutionality of the acts of the Nevada receiver. Whether or not a state may enact legislation permitting the receiver to do as herein stated is a federal question of substance not heretofore determined by this Honorable Court and the case below sustaining constitutionality of the statute was decided in a way not in accord with applicable decisions.

The Nevada statute purporting to give jurisdiction over out of state real estate (Nev. Rev. Statutes §78.640) to a temporary receiver when the very facts of jurisdiction (10% ownership of stock or debts and ground of appointment) were yet to be tried and to give the temporary receiver the power to compound and settle claims with respect thereto (Nev. Rev. Statutes §78.635 paragraph 2 (a) and (c)) was unconstitutional as applied herein by the receiver's making a conveyance of an interest in California real estate. The act of the receiver was not an adjudication of the controversy between the parties but was the remaking of the deal between them and making a different contract between them. This was not a receiver appointed after judgment to carry out a judgment adjudicating a controversy, but rather was a receiver *pendente lite* who, prior to the trial on the issues as to ownership of stock, insolvency and grounds for the appointment of a receiver, conveyed and assigned an interest in California real estate. Specifically, Nevada statute and Nevada receivers cannot deal with California real estate because so to do assumes extraterritorial effect over real property and does not require compliance with the

law of the state where the land is situated; the record does not show any attempt to follow California law in any of the following respects:

a. The receiver's argument created two certificates of interest in a mining title or lease, to wit: Transcont. was to hold a 20% carried interest while Western Geothermal, Inc. was to have an option to keep the operating interest in the lease or to reconvey in which case it would hold a 20% carried interest [Assignment, paragraphs 3, 4 and 8; Rec. Vol. II, pp. 408 to 409 and 412]. Rights to participate in the proceeds of mining or oil ventures are securities in California as held by *People v. Sidewell,* 27 Cal. 2d 121, 162 P. 2d 913; *Morello v. Metzinbaum,* 25 Cal. 2d 494, 154 P. 2d 670. California securities issued without a permit are void (§26100 Calif. Corp. Code) and parties are entitled to rescission as held in *Ogier v. Pacific Oil & Gas Development Corp.,* 132 Cal. App. 2d 496, 282 P. 2d 574 and the issuance is a felony (§26104 Calif. Corp. Code). Issuance of a security pursuant to judicial order is not exempt unless pursuant to a plan under the Bankruptcy Act (Calif. Corp. Code §25100(k)). Exempt transactions do not authorize issuance or creation of securities.

b. The California constitutional prohibition against the impairment of contracts prohibits even a court from impairing the obligation of contract as held in *Bradley v. Superior Court,* 48 Cal. 2d 509, 310 P. 2d 634.

c. Courts cannot remake contracts to settle disputes as held in *Siemon v. Russell,* 194 Cal. App. 2d 592; 15 Cal. Rptr. 218, S. Ct. hear. den.

d. Receivers can assign or sell an interest in real property only after posting on the real property and publishing in a newspaper a notice of the intended sale as required by §§568.5 and 692 of the California Code of Civil Procedure.

e. Out of state temporary receivers cannot assign California real estate without a California court order. It is clear that no constitutional provision requires California to recognize the assignment. See *Reynolds v. Adden,* 136 U.S. 348, 34 L. Ed. 360, 10 S. Ct. 843.

In each of the foregoing respects the statute was unconstitutionally applied so the order sought to be reviewed violated California law and was void.

By acting contrary to California law affecting California real property, the Nevada court denied full faith and credit to the laws of California.

That any of the foregoing could occur is a good reason for not allowing temporary receivers to assign out of state land without benefit of ancillary court order. The most outrageous violation of the rights of petitioners occurred in the ingenious manner in which the respondents applied the Nevada statute. Because of disputes as to the operation of the lease and *alleged* danger of losing the lease, Western caused a receiver to be appointed, not of the whole leasehold, but only of the interest of Transcon. That receiver was in a position that he could not deal with or save the leasehold except by dealing with the party to the suit who held the other interest in the leasehold. The fair way to salvage a leasehold held by two persons is to have a receiver appointed of the entire interest of the two parties in the leasehold; then, the receiver is in a position to deal with either of those

parties and their successors in interest and persons claiming through them or willing to assist or finance them. Where the interest of one party is held by a receiver, only the other party can deal with the receiver. This is inherently the taking of property without due process of law and was an outrageous violation of the constitutional rights of petitioners. It offers a way for any person to make a deal, get a temporary receiver and then enlarge his position by taking property from the one who suffered the temporary receivership and prevent a trial on the very issues raised by the party who caused the receiver to be appointed.

Where an arm of the court, a receiver, holds the assets of a party, he thereby prevents raising funds for defense of such party's rights and he and the court have a special duty to the corporation subject to the receivership. Arthur Goldberg, United States Ambassador to the United Nations and former Justice of this Honorable Court, recently commented in an address to an annual interfaith convocation marking the opening of the fall term for federal and state courts in New York (quoting from the October 25, 1967 issue of the L.A. Daily Journal):

> "One major reason for riots in our cities, . . . is that the rich and poor are not in actuality equal before the law. The Supreme Court in various rulings on indigents' rights has moved to correct this, but the problem is still 'lively and relevant', especially in the lower courts where 'the poor man first comes fact to face with the law' . . . . 'What we cannot afford is to allow a whole class of people to grow up believing that they are born losers, that the game is stacked against them and there is no use even trying to play,' . . .".

Many recent cases hold that the right to counsel in the Sixth Amendment is protected by the Fourteenth Amendment to the United States Constitution. We say the latter should protect one against a court's using his assets to defeat his rights and against the court's violating the law of the place where his real property is situated.

There is also an intervening circumstance of substantial effect which makes the granting of a writ herein of great importance to the public and the parties. That circumstance is the filing by Transcon of a suit in the United States District Court for the Southern District of California alleging that the Nevada orders are void and beyond the jurisdiction of the court for each of the reasons as to which it is argued that the Nevada statute is unconstitutional. It is significant for two reasons. First, Western will contend that only the receiver can act and therefore there is no remedy for the orders illegally made and made without jurisdiction. Secondly, Transcontinental Power Company cannot develop the lease for the many years that it will take to conclude that action. Those issues could be decided on the granting of this petition herein.

An early disposition is in the public interest so that Transcon can resume generation of electricity. The Air Pollution District of Los Angeles County states that the following contaminants were put in the air in Los Angeles County daily during a period ending in January, 1967: sulphur dioxide, by all sources 630 tons, by electric power plants, 465 tons; all con-

taminants except gasoline vapor and motor vehicles, 2145 tons; power plants, 695 tons. In Southern California, 1320 tons of contaminants are emitted in the air daily in the winter in the generation of electricity. The generation of electricity contributes materially to the smog problem which is jeopardizing the health of persons living in Southern California. It has been estimated that the energy potential of the Imperial Valley steam field is equivalent to the total electricity generated in 1959 from fossil fuels in all Southern California and would last for several decades. Most of the proven wells in the field are west of the Imperial fault and bottom in strata in which the fluid consists of about 30% minerals and there is no known way to generate electricity therefrom. A large portion of the Nelson ranch is on the east side of that fault and wells no. 1 and 3 produce water with less than 3½% minerals from depths of less than 4,000 feet which turn to steam.

Southern California Edison Company, the major producer of electricity from fossil fuels, indicated that it would buy the electricity produced from natural steam in the Salton Sea field.

By condensing steam 1,076,120 gallons of water per well will be recovered. It is in the public interest to settle the important cquestions of law by granting of the petition herein rather than reserving the matters of Nevada jurisdiction for determination by the collateral suit which has been filed.

Conclusion.

While petitioners are confident that the void orders are subject to collateral attack, we forsee costly and lengthy litigation to overcome the procedural problems of establishing capacity of plaintiffs to assert the right to the adjudication because of the existence of the receiver.

We earnestly request this Honorable Court to grant this petition for rehearing and grant the petition for Writ of Certiorari so that the outrageous wrongs may be remedied and persons cannot take from their partners, joint venturers, and members of syndicates by having a receiver appointed of the interest of the other partner or joint venturer only, be in such position that the receiver can deal only with the one who caused his appointment, and then have that receiver sell or assign the interest of the one in receivership in breach and violation of the fiduciary relationship of his former partner or joint venturer to the party who caused the receivership.

Considering that Western will assert that only the Nevada receiver can sue to question his violations of the law and procuring a void order, this court should save the parties years of litigation in the collateral action by granting certiorari and striking down the void order on this direct attack and, if not, it should rule that the writ is denied because a stockholder individually or derivatively may, in a collateral action, attack the void order procured by the receiver in violation of constitutional rights of the corporation.

Respectfully submitted,

ROY B. WOOLSEY, AND
GILBERT W. BOYNE.
Attorneys for Petitioners.

Certificate.

The undersigned certifies that the foregoing petition is presented in good faith and is not for delay and the foregoing petition is restricted to the following grounds, to wit: the intervening circumstances of substantial or controlling effect and to other substantial grounds available to petitioner although not previously presented.

ROY B. WOOLSEY
Attorney for Petitioners.

APPENDIX.

California Code of Civil Procedure.

§568.5

Sales; Authority; Manner; Confirmation; No Redemption.

A receiver may, pursuant to an order of the court, sell real or personal property in his possession as such receiver, upon the notice and in the manner prescribed by law for the sale of such property under execution. The sale shall not be final until confirmed by the court. Sales made pursuant to this section shall not be subject to redemption.

§692.

Sale on Execution or Under Power in Mortgage or Deed of Trust; Notice.

Before the sale of property on execution or under power contained in any mortgage or deed of trust, notice threof must be given as follows:

* * *

3. *Real estate.* In case of real property: by posting a similar notice particularly describing the property at least 20 days before date of sale, in one public place in the city where the property is to be sold if the property is to be sold in a city, or, if not, then in one public place in the judicial district in which the property is to be sold and publishing a copy thereof once a week for the same period, in some newspaper of general circulation published in the city in which the property or some part thereof is situated, if any part thereof is situated in a city, if not, then in some newspaper of general circulation published in the judicial district in which the property or some part thereof is situated, or,

in case no newspaper of general circulation and published in the city or judicial district, as the case may be, in some newspaper of general circulation published in the county in which the property or some part thereof is situated. * * *

California Corporations Code.

§25003.

Company. "Company" Includes All of the Following:

(a) All domestic and foreign private corporations, associations, syndicates, joint stock companies, and partnerships of every kind.

(b) Trustees as defined in Section 25004.

(c) Individuals selling, offering for sale, negotiating for the sale of, or taking subscriptions for, any security of their own issue.

§25008.

Security. "Security" Includes All of the Following:

(a) Any stock, including treasury stock; any certificate of interest or participation; any certificate of interest in a profit-sharing agreement; any certificate of interest in an oil, gas, or mining title or lease; any transferable share, investment contract, or beneficial interest in title to property, profits, or earnings.

(b) Any bond; any debenture; any collateral trust certificate; any note; any evidence of indebtedness, whether interest-bearing or not.

(c) Any guarantee of a security.

(d) Any certificate of deposit for a security.

§25100.

Securities Exempted.

Except as otherwise expressly provided in this division the Corporate Securities Law does not apply to any of the following classes of securities.

(k) Any Security issued under or pursuant to a plan of reorganization which, pursuant to any of the provisions of the Act of Congress entitled "An Act to Establish a Uniform System of Bankruptcy throughout the United States" approved June 1, 1898, and acts amendatory thereof and supplementary thereto, has been confirmed by the decree or order of a court of competent Jurisdiction. [3 Corp. Code] 21.

§25500.

Permit for Sale of Securities of Company's Own Issue.

No company shall sell any security of its own issue, except upon a sale for a delinquent assessment against the security made in accordance with the laws of this State, or offer for sale, negotiate for the sale of, or take subscriptions for any such security, until it has first applied for and secured from the commissioner a permit authorizing it to so do.

§26100.

Void Securities; Issuance or Sale Without Permit or in Violation of Permit.

Every security of its own issue sold or issued by any company without a permit of the commissioner then in effect authorizing the issuance or sale of the security is void. Every security of its own issue sold or issued by a company with the authorization of the commissioner but which has been sold or issued in non-

conformity with any provision in the permit authorizing the issuance or sale of the security is void.

§26104.
Public Offenses; Penalty.

Every officer, agent, or employee of any company and every other person, who does any of the following acts is guilty of a public offense punishable by imprisonment in a state prison not exceeding five years or in a county jail not exceeding two years, or by a fine not exceeding five thousand dollars ($5,000), or by both such fine and imprisonment:

(a) *Issuance or sale of security in nonconformity with permit.* Knowingly authorizes, directs, or aids in the issue or sale of, or issues or executes, or sells, or causes or assists in causing to be issued, executed, or sold, any security, in nonconformity with a permit of the commissioner then in effect authorizing such issue, or contrary to the provisions of this division, or of the Constitution of this State.

* * *

(d) *Sale of security issued in violation of law.* With knowledge that any security has been issued or executed in violation of any provision of this division, sells, or offers the security for sale.

* * *

(Note: after incidents material herein, §26104 was amended to make the offense punishable by imprisonment not exceeding ten years)

78.630

Application of Creditors or Stockholders of Insolvent Corporation for Injunction and Appointment of Receiver or Trustee; Hearing.

1. Whenever any corporation shall become insolvent or shall suspend its ordinary business for want of funds to carry on the same, or if its business has been and is being conducted at a great loss and greatly prejudicial to the interest of its creditors or stockholders, any creditors holding 10 percent of the outstanding indebtedness, or stockholders owning 10 percent of the outstanding capital stock entitled to vote, may, by petition or bill of complaint setting forth the facts and circumstances of the case, apply to the district court of the county in which the principal office of the corporation is located for a writ of injunction and the appointment of a receiver or receivers or trustee or trustees.

2. The court, being satisfied by affidavit or otherwise of the sufficiency of the application and of the truth of the allegations contained in the petition or bill, and upon hearing after such notice as the court by order may direct, shall proceed in a summary way to hear the affidavits, proofs and allegations which may be offered in behalf of the parties.

3. If upon such inquiry it shall appear to the court that the corporation has become insolvent and is not about to resume its business in a short time thereafter, or that its business has been and is being conducted at a great loss and greatly prejudicial to the interests of its creditors or stockholders, so that its business cannot be conducted with safety to the public, it may

issue an injunction to restrain the corporation and its officers and agents from exercising any of its privileges or franchises and from collecting or receiving any debts or paying out, selling, assigning or transferring any of its estate, moneys, funds, lands, tenements or effects, except to a receiver appointed by the court, until the court shall otherwise order.

[46:177:1925; NCL § 1645]

78.635.

Appointment of Receiver or Trustee of Insolvent Corporation: Powers.

1. The district court, at the time of ordering the injunction, or at any time afterwards, may appoint a receiver or receivers or a trustee or trustees for the creditors and stockholders of the corporation.

2. The receiver or receivers or trustee or trustees shall have full power and authority:

(a) To demand, sue for, collect, receive and take into his or their possession all the goods and chattels, rights and credits, moneys and effects, lands and tenements, books, papers, choses in action, bills, notes and property, of every description of the corporation; and

(b) To institute suits at law or in equity for the recovery of any estate, property, damages or demands existing in favor of the corporation; and

(c) In his or their discretion to compound and settle with any debtor or creditor of the corporation, or with persons having possession of its property or in any way responsible at law or in equity to the corporation at the time of its insolvency or suspension of business, or afterwards, upon such terms and in such manner as he or they shall deem just and beneficial to the corporation; and

(d) In case of mutual dealings between the corporation and any person to allow just setoffs in favor of such person in all cases in which the same ought to be allowed according to law and equity.

3. A debtor who shall have in good faith paid his debt to the corporation without notice of its insolvency or suspension of business, shall not be liable therefor, and the receiver or receivers or trustees shall have power to sell, convey and assign all the estate, rights and interests, and shall hold and dispose of the proceeds thereof under the directions of the district court.

[Part 47:177:1925; NCL § 1646]

78.640.

Property and Privileges of Insolvent Corporation Vest In Appointed Receiver.

All real and personal property of an insolvent corporation, wheresoever situated, and all its franchises, rights, privileges and effects shall, upon the appointment of a receiver, forthwith vest in him, and the corporation shall be divested of the title thereto.

[48:177:1925; NCL § 647]

* * *

78.650.

Stockholders' Application for Injunction and Appointment of Receiver When Corporation Mismanaged.

1. Any holder or holders of one-tenth of the issued and outstanding capital stock may apply to the district court, held in the district where the corporation has its principal place of business, for an order dissolving the corporation and appointing a receiver to wind up its affairs, and by injunction restrain the corporation from exercising any of its powers or doing business what-

soever, except by and through a receiver appointed by the Court, whenever:

(a) The corporation has willfully violated its charter; or

(b) Its trustees or directors have been guilty of fraud or collusion or gross mismanagement in the conduct or control of its affairs; or

(c) Its trustees or directors have been guilty of misfeasance, malfeasance or nonfeasance; or

(d) The corporation shall be unable to conduct the business or conserve its assets by reason of the act, neglect or refusal to function of any of the directors or trustees; or

(e) The assets of the corporation are in danger of waste, sacrifice or loss through attachment, foreclosure, litigation or otherwise; or

(f) The corporation has abandoned its business; or

(g) The corporation has not proceeded diligently to wind up its affairs, or to distribute its assets in a reasonable time; or

(h) The corporation has become insolvent; or

(i) The corporation, although not insolvent, is for any cause not able to pay its debts or other obligations as they mature; or

(j) The corporation is not about to resume its business with safety to the public.

2. The application may be for the appointment of a receiver, without at the same time applying for the dissolution of the corporation, and notwithstanding the absence, if any there be, of any action or other proceeding in the premises pending in such court.

3. In any such application for a receivership, it shall be sufficient for a temporary appointment if notice of the same be given to the corporation alone, by process as in the case of an application for a temporary restraining order or injunction, and the hearing thereon may be had after 5 days' notice unless the court shall direct a longer or different notice and different parties.

4. The court may, if good cause exists therefor, appoint one or more receivers for such purpose, but in all cases directors or trustees who have been guilty of no negligence nor active breach of duty shall have the right to be preferred in making the appointment, and the court may at any time for sufficient cause make a decree terminating the receivership, or dissolving the corporation and terminating its existence, or both, as may be proper.

5. Receivers so appointed shall have, among the usual powers, all the functions, powers, tenure and duties to be exercised under the direction of the court as are conferred on receivers and as provided in NRS 78.635, 78.640 and 78.645, whether the corporation shall be insolvent or not.

[49a:177:1925; added 1941, 405; 1931 NCL §1648.01]